No. 03-30077

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellant - Cross-Appellee

v.

LEN DAVIS,

Defendant - Appellee - Cross-Appellant

and

PAUL HARDY, also known as P, also known as Cool,

Defendant - Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

BRIEF FOR THE UNITED STATES AS APPELLANT - CROSS-APPELLEE

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STATEMENT REGARDING ORAL ARGUMENT

The United States requests oral argument, and believes that it would be helpful to the Court.

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IN THE UNITED STATES COURT OF APPEALS
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UNITED STATES OF AMERICA,

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LEN DAVIS,

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and

PAUL HARDY, also known as P, also known as Cool,

Defendant - Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

BRIEF FOR THE UNITED STATES AS APPELLANT - CROSS-APPELLEE

STATEMENT OF JURISDICTION

This is an appeal from a district court order entered on December 12, 2002, which held that the Third Superseding Indictment did not allege the requisite elements to support a death sentence for defendants Len Davis and Paul Hardy, thereby eliminating that sentencing option and dismissing a portion of the Indictment. The district court had jurisdiction under 18 U.S.C. 3231.

The United States filed a Notice of Appeal on January 10, 2003 (10 R. 3092-3093/D. Doc. 1086/RE 3).[1] Davis filed a Notice of Cross-Appeal on January 21, 2003 (10 R. 3090-3091/D. Doc. 1087/RE 4). This Court has jurisdiction with respect to the United States' appeal under 18 U.S.C. 3731. See *United States* v. *Wilson*, 420 U.S. 332, 337 (1975); *United States* v. *Woolard*, 981 F.2d 756 (5th Cir. 1993). This Court, however, does not have jurisdiction with respect to Davis's cross-appeal. See 28 U.S.C. 1291; Sec. VI, pp. 41-44, *infra*; see also *Midland Asphalt Corp.* v. *United States*, 489 U.S. 794, 798 (1989).

STATEMENT OF THE ISSUES

1. Whether the district court erred in its conclusion that the Third Superseding Indictment did not sufficiently allege Davis and Hardy's intent and substantial planning and premeditation to establish their eligibility for death under the Federal Death Penalty Act, 18 U.S.C. 3591 *et seq.*, given the Indictment's detailed description of, *inter alia*, their agreement to kill Ms. Kim Marie Groves, numerous

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[1] "__ R. __" refers to the volume and page number, respectively, of the Record on Appeal. "2d Supp. R." refers to the Second Supplemental Record, and "3d Supp. R." refers to the Third Supplemental Record on Appeal. "D. Doc. __" refers to the document number recorded on Davis's docket sheet. "H. Doc. __" refers to the document number recorded on Hardy's docket sheet. "RE __" or "RE _:_" refers to the tab, or tab and the court's bate-stamped page number for documents contained in the Record Excerpts For The United States. If materials are present in both Davis and Hardy's Record on Appeal, only Davis's docket entry will be recorded. When available, cross-references to the same material is separated by a front slash ("/"). When materials are included in the Record Excerpts, however, the second and subsequent citations only will be to the RE cite.

conversations and various acts to plan and coordinate the murder, and the intentional killing of Ms. Groves.[2]

2. Whether this Court has jurisdiction to hear Davis's cross-appeal when the district court has not yet sentenced him.

STATEMENT OF THE CASE

A one-count Indictment was issued on December 13, 1994, against defendants Len Davis, Paul Hardy, and Damon Causey (1 R. 214-216/D. Doc. 1/RE 5). A three-count Superseding Indictment was issued on January 17, 1995 (1 R. 90-93/D. Doc. 50/RE 6). A Second Superseding Indictment was issued on March 24, 1995 (1 R. 2-7/D. Doc. 99/RE 7). Ultimately, a Third Superseding Indictment was filed on August 18, 1995 (2 R. 289-294/D. Doc. 187/RE 8). Count One of the Indictment charged defendants with conspiracy to violate the civil rights of Ms. Kim Marie Groves and another unnamed individual by use of excessive force, resulting in death, in violation of 18 U.S.C. 241 (RE 8:289-291). Eight Overt Acts in furtherance of the conspiracy were alleged (RE 8:290-291). Count Two charged defendants with violating Ms. Groves' civil rights by use of excessive force, *i.e.*, by shooting Ms. Groves with a firearm, resulting in her death, in violation of 18 U.S.C. 242 and 2 (RE 8:291-292). Count Three charged defendants with willfully killing Ms. Groves to prevent her communications to a law enforcement officer regarding a possible federal crime, in violation of 18 U.S.C.

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[2] Hereinafter, "Indictment" refers to the Third Superseding Indictment, unless otherwise stated.

1512(a)(1)(C) and 2 (RE 8:292-293). At the time of the charged offenses, Davis was an officer with the New Orleans Police Department, Hardy was a drug dealer in New Orleans, and Causey was an associate of Davis and Hardy.

The relevant Overt Acts set forth in Count One read as follows:

> 1. After learning that Kim Marie Groves had filed a civil rights complaint against him, defendant LEN DAVIS contacted defendant PAUL HARDY, a/k/a "P", a/k/a "Cool", on several occasions by cellular telephone on or about October 13, 1994, to arrange the murder of Kim Marie Groves.
>
> 2. On or about October 13, 1994, defendant LEN DAVIS contacted defendant DAMON CAUSEY by cellular telephone to arrange a meeting whereby defendant LEN DAVIS would identify Kim Marie Groves to defendants PAUL HARDY, a/k/a "P", a/k/a "Cool", and DAMON CAUSEY, thereby facilitating the murder of Kim Marie Groves.
>
> 3. On or about October 13, 1994, defendant LEN DAVIS, while on-duty and while using his official police car, conducted surveillance of Kim Marie Groves for the purpose of reporting Groves' physical description and location to defendant PAUL HARDY, a/k/a "P", a/k/a "Cool".
>
> 4. On or about October 13, 1994, at 10:01 p.m., defendant LEN DAVIS, during a cellular telephone conversation, ordered defendant PAUL HARDY, a/k/a "P", a/k/a "Cool", to "get that whore," thereby ordering the murder of Kim Marie Groves. Defendant PAUL HARDY, a/k/a "P", a/k/a "Cool", agreed to kill Kim Marie Groves and stated in response, "Alright I'm on my way."
>
> 5. On or about October 13, 1994, at 10:55 p.m., defendant PAUL HARDY, a/k/a "P", a/k/a "Cool", shot Kim Marie Groves in the head with a 9mm firearm, which resulted in her death.
>
> (RE 8:290-291).

On July 31, 1995, the United States separately notified Davis and Hardy of its intent to seek the death penalty under the Federal Death Penalty Act (FDPA) upon conviction of any count, and identified the applicable mental culpability provisions and statutory aggravating factors to establish their respective death eligibility (2 R. 309-310/D. Doc. 179 (Notice to Hardy); 2 R. 311-312/D. Doc. 178 (Notice to Davis)).[3]

By Order and Reasons dated October 23, 1995, the district court rejected defendants' challenges to, *inter alia*, the constitutionality of the FDPA generally and the statutory aggravating factor of substantial planning and premeditation, in particular. *United States* v. *Davis*, 904 F. Supp. 554 (E.D. La. 1995); see *United States* v. *Davis*, 912 F. Supp. 938 (E.D. La. 1996) (rejecting defendants' challenges to nonstatutory aggravating factors and proffered evidence). While Davis and Hardy raised multiple challenges to the Indictment, they did not assert before trial

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[3] Specifically, the United States notified Davis that it would seek the death penalty based on proof of intent pursuant to 18 U.S.C. 3591(a)(2)(A)-(C), and the statutory aggravating factors of substantial planning and premeditation, 18 U.S.C. 3592(c)(9), and procuring the offense by payment and promise of payment, 18 U.S.C. 3592(c)(7) (2 R. 311-312/D. Doc. 178). Similarly, the United States notified Hardy that it would seek the death penalty based on evidence of intent pursuant to 18 U.S.C. 3591(a)(2)(A)-(D), and the statutory aggravating factors of substantial planning and premeditation, 18 U.S.C. 3592(c)(9), and the commission of the offense for the receipt, or expectation of receipt, of pecuniary gain, 18 U.S.C. 3592(c)(8) (2 R. 309-310/D. Doc. 179). On October 2, 1995, the United States provided separate notice to Davis and Hardy of the nonstatutory aggravating factors upon which the government would rely in support of the death penalty (3 R. 850-354/D. Doc. 276 (Davis); 3 R. 846-849/H. Doc. 277 (Hardy)).

that the Indictment gave them insufficient notice of the charges that they faced (see 10 R. 3113/D. Doc. 1080/RE 13:3113).

In April 1996, following a jury trial held in the United States District Court for the Eastern District of Louisiana, Davis and Hardy were found guilty of Counts One through Three, Causey was found guilty of Counts One and Two, and the jury was deadlocked with respect to Causey on Count Three (6 R. 2031-2037/D. Doc. 498/RE 9). During the penalty phase, the jury unanimously found, for both defendants, the statutory aggravating factor of substantial planning and premeditation, 18 U.S.C. 3592(c)(9), and that Davis and Hardy, respectively, had the requisite intent pursuant to Section 3591(a)(2)(C) and Section 3591(a)(2)(A) (6 R. 1940-1944/D. Doc. 523/RE 10). At the conclusion of the penalty phase, the jury recommended that both Davis and Hardy be sentenced to death (6 R. 1922-1927/D. Doc. 524/RE 11 (Davis); 6 R. 1910-1916/D Doc. 528/RE 12 (Hardy)). The jury did not reach a unanimous verdict on the second statutory aggravating factor regarding action for pecuniary gain for Davis or Hardy.

The district court (Berrigan, J.), sentenced Davis and Hardy to death on November 7, 1996 (7 R. 2380/D. Doc. 631). Causey was sentenced to life imprisonment. Each defendant appealed his respective conviction and sentence.

This Court affirmed Causey's conviction and sentence, affirmed Davis and Hardy's convictions on Counts One and Two, and reversed Davis and Hardy's convictions on Count Three, holding that there was insufficient evidence to support the conviction on that count. *United States* v. *Causey*, 185 F.3d 407, 423 (5th Cir.

1999), cert. denied, 530 U.S. 1277 (2000). Given that the jury's recommendations of death for Davis and Hardy were not tied specifically to conviction of a particular count, this Court vacated Davis and Hardy's death sentences and remanded for sentencing. *Ibid.*

On September 29, 2000, the United States notified Davis of its intent to seek the death penalty based on evidence of intent pursuant to 18 U.S.C. 3591(a)(2)(A)-(C), and the statutory aggravating factors of substantial planning and premeditation, 18 U.S.C. 3592(c)(9), and Davis's prior conviction of a felony that allows imposition of a sentence exceeding five or more years, 18 U.S.C. 3592(c)(12) (7 R. 2247-2248/D. Doc. 744). The United States notified Hardy of its intent to seek the death penalty based on evidence of intent pursuant to 18 U.S.C. 3591(a)(2)(A)-(D), and the statutory aggravating factor of substantial planning and premeditation, 18 U.S.C. 3592(c)(9) (1 3d Supp. R. 1756-1756a/H. Doc. 743). The United States also notified Davis and Hardy of the nonstatutory aggravating factors it would rely upon to seek the death penalty (7 R. 2249-2252/D. Doc. 741; 1 3d Supp. R. 1757-1760/H. Doc. 742).[4]

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[4] On January 30, 2001, the United States filed an Amended Notice to Davis of its intent to seek the death penalty, which was identical in all respects to the September 2000, notice except that it did not include the second statutory aggravating factor that was based on Davis's recent felony conviction (8 R. 2668-2669/D. Doc. 836). Davis's felony drug conviction was now identified as a nonstatutory aggravating factor (8 R. 2670-2673/D. Doc. 835; See 2 3d Supp. R. 2110-2111/H. Doc. 827). On January 30, 2001, the United States also served an amended notice to Hardy of the nonstatutory aggravating factors the government would rely upon to pursue a death sentence (2 3d Supp. R. 2099-2102/H. Doc. 834).

The passage of over two years between the denial of certiorari in the original appeal and the decision challenged here on appeal is primarily due to two series of actions. First, between October 2000, and June 2002, Davis and Hardy filed numerous unsuccessful motions that challenged, *inter alia*, the validity of their convictions, the constitutionality of the death penalty, and the constitutionality of the FDPA's statutory aggravating factor of substantial planning and premeditation (see, *e.g.*, 7 R. 2150/D. Doc. 771; 1 3d Supp. R. 1730-1738/H. Doc. 755). Many of these motions reiterated arguments that had been rejected previously by the district court, or asserted that recent decisions by this Court warranted a different result (see, *e.g.*, *ibid*.; 10 R. 3244-3250/D. Doc. 1049; see also 10 R. 3416-3422/D. Doc. 1019).

Second, after this Court's remand for sentencing, Davis stated his intention to proceed *pro se*, and stated repeatedly that he did not intend to present mitigating evidence, but only will argue residual doubt as a basis to challenge the potential death sentence. See *United States* v. *Davis*, 150 F. Supp. 2d 918, 920 (E.D. La. 2001). This decision led to a series of orders and challenges regarding the district court's appointment of independent or standby counsel. First, the district court ruled that Davis did not have a right pursuant to *Faretta* v. *California*, 422 U.S. 806 (1975), to proceed *pro se* at capital sentencing, and that even if he did, his stated intentions to not present mitigating evidence foreclosed such a right. *Davis*, 150 F. Supp. 2d at 923. Davis successfully sought a writ of mandamus from this Court reversing that order. *United States* v. *Davis*, No. 01-30656 (5th Cir. July 17, 2001).

Next, the district court appointed a standby counsel and granted her authority to present mitigating evidence against Davis's wishes. *United States* v. *Davis*, 180 F. Supp. 2d 797 (E.D. La. 2001). This ruling also was reversed by this Court on mandamus. *United States* v. *Davis*, 285 F.3d 378 (5th Cir. 2002). The standby counsel petitioned for certiorari, which was denied. See *White* v. *United States*, 537 U.S. 1066 (2002).

On June 24, 2002, the Supreme Court issued its decision in *Ring* v. *Arizona*, 536 U.S. 584, 609 (2002), reversing its decision in *Walton* v. *Arizona*, 497 U.S. 639 (1990), and holding that the statutory aggravating factors that are required to establish a defendant's eligibility for the death penalty must be found by the jury upon proof beyond a reasonable doubt.

On July 12, 2002, relying primarily on *Ring*, Davis filed a motion seeking reconsideration of the court's refusal to dismiss the Indictment due to the Indictment's alleged failure to allege the requisite elements of the FDPA (10 R. 3201-3208/D. Doc. 1059; see 10 R. 3124-3140/D. Doc. 1078 (reply memorandum)).[5] Hardy similarly argued that the Indictment did not allege the required mental culpability or a statutory aggravating factor to render him death eligible, and that he could only be subject to a maximum term of ten years (3 3d Supp. R. 2340-2344/H. Doc. 1066; 3 3d Supp. R. 2298-2310/H. Doc. 1076).

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[5] The motion for reconsideration followed the district court's recent denial of Davis's motion to dismiss Counts One and Two for the alleged failure to allege the requisite *mens rea* for "death resulting" (10 R. 3242-3243/D. Doc. 1050; 10 R. 3244-3250/D. Doc. 1049).

Notably, neither Davis nor Hardy alleged that he was prejudiced by the alleged lack of notice of the charges or the United States' intent to seek the death penalty.

In opposition, the United States asserted that the text of the Indictment, while not quoting the FDPA verbatim, alleged mental culpability and the statutory aggravating factor of substantial planning and premeditation to give sufficient notice to the defendants that they were death eligible under the FDPA, and that any error in the Indictment was harmless (10 R. 3148-3164/D. Doc. 1072).

The district court held a hearing on these motions on November 6, 2002, and the Court's order was issued December 12, 2002 (RE 13). In sum, the district court held that, under *Ring*, a federal indictment now must allege the mental culpability and statutory aggravating factor to give notice and render a defendant death eligible (RE 13:3102-3105). The district court further concluded that the Indictment did not sufficiently allege these factors and, thus, neither Davis nor Hardy was eligible for a death sentence (RE 13:3106-3112).

The United States filed a Notice Of Appeal on January 10, 2003 (RE 3). Davis filed a Notice Of Cross-Appeal on January 21, 2003 (RE 4).

STATEMENT OF FACTS

A. Facts Underlying Indictment And Conviction

This case concerns the "execution-style murder" of Ms. Kim Marie Groves on October 13, 1994, in New Orleans, Louisiana, through the coordinated efforts of Len Davis, a New Orleans police officer at that time, Paul Hardy, and Damon Causey. *United States* v. *Causey*, 185 F.3d 407, 411 (5th Cir. 1999), cert. denied,

530 U.S. 1277 (2000). Davis, while an officer, "exchanged protection for favors" to Hardy, who was a drug dealer in New Orleans. *Ibid*. One of Hardy's favors, at Davis's request, was to murder Ms. Groves. *Ibid*.

Unbeknownst to Davis, at the time he was planning and coordinating the murder of Ms. Groves with Hardy and Causey, he was the target of an undercover investigation, and his cellular telephone conversations were recorded. *Ibid*. The evidence at trial included these conversations (which are summarized in the Overt Acts of Count One of the Indictment), and the testimony of Sammie Williams, Davis's police partner who was present during many of the conversations. *Ibid*.

On or about October 10, 1994, Davis and Williams were partners on duty when they initiated a stop of twin brothers, Nathan and Nathaniel Norwood (18 2d Supp. R. 316). The officers mistakenly believed that one of the twins was another individual who was responsible for the recent shooting of a New Orleans police officer (*ibid*.). While conducting a name check of the Norwoods, Ms. Groves came on the scene, challenged the officers' actions, and argued with Davis (18 2d Supp. R. 316-317). On October 11, 1994, Davis and Williams initiated a second stop of Nathan Norwood, again in a case of mistaken identity (18 2d Supp. R. 317-319, 322). When Williams stopped Norwood, Williams hit him on the back of the head with his pistol, and the force "snapped" Norwood's head into a porch railing (18 2d Supp. R. 318-319). Ms. Groves again was at the scene, "real angry," and she spoke with Sergeant Trepagnier about the officers' treatment of Norwood (18 2d Supp. R.

322-323). She later filed a complaint against Williams and Davis with the Internal Affairs office of the New Orleans Police Department (18 2d Supp. R. 324).

Davis learned of this complaint, and at approximately 1 a.m., on October 13, 1994, he contacted Williams and told him that Ms. Groves had filed a complaint (*ibid.*). Davis's anger at Ms. Groves was apparent when Williams began his shift at 2:30 p.m. on October 13, 1994, again assigned as Davis's partner (18 2d Supp. R. 325-326). At approximately 5 p.m., while Davis and Williams were driving, they saw Ms. Groves, and she and Davis exchanged gestures, pointing at each other (18 2d Supp. R. 327).

Davis repeatedly tried to contact Hardy by telephone that day, and when they spoke, their comments reflected that they had spoken earlier about the plan to kill Ms. Groves (18 2d Supp. R. 328-330). Davis arranged to have Hardy and Causey meet him at the police station so that he could take them to see Ms. Groves (18 2d Supp. R. 333-335). While on duty, Davis made several trips to Ms. Groves' neighborhood in an effort to find her so that he could show her to Hardy. For example, at approximately 7:30 p.m., Davis told Hardy that he was going to look for Ms. Groves (18 2d Supp. R. 339). But he was unsuccessful (*ibid.*). After that, Hardy, while armed, met with Davis and Williams and traveled in the police car back to Ms. Groves' neighborhood so that they could find her (18 2d Supp. R. 340-343). At one point, Hardy got out of the car and walked down some streets while Davis and Williams continued driving, but they could not find Ms. Groves (18 2d Supp. R. 342).

At approximately 9:50 p.m., Davis again called Hardy, questioning his commitment to the plan, and stated that he was going to return to Ms. Groves' neighborhood to look for her (18 2d Supp. R. 344-345). Still using the police cruiser, this time Davis was successful (18 2d Supp. R. 345). Davis immediately paged Hardy to notify him of Ms. Groves' location and provide a description of her clothing (18 2d Supp. R. 346). At 10:43 p.m., Davis again called Hardy asking about his activity, and Hardy responded that he was "on his way" (18 2d Supp. R. 347-348; Gov. Trial Exh. C-12). At approximately 10:55 p.m., Hardy shot Ms. Groves, killing her (18 2d Supp. R. 348-349, 352).

B. District Court Opinion

In its December 2002, ruling, the district court held that *Ring* v. *Arizona*, 536 U.S. 584 (2002), in conjunction with *United States* v. *Cotton*, 535 U.S. 625 (2002), *Apprendi* v. *New Jersey*, 530 U.S. 466 (2002), and *Jones* v. *United States*, 526 U.S. 227 (1999), requires that, in a capital case, the indictment allege the elements necessary to support the death penalty under the Federal Death Penalty Act (FDPA) (RE 13:3099-3121; see RE 13:3103-3105) (the "addition of *Ring* to the rules set forth in *Jones* and *Apprendi* compels the conclusion that in a federal capital case, the grand jury must both find the FDPA intent and factors upon which the death penalty is premised and must set forth those findings in the allegations of [the] indictment in order to pass Fifth Amendment muster"). The district court rejected the United States' claim that the Overt Acts stated in Count One, while not quoting the FDPA verbatim, included equivalent findings by the grand jury of

defendants' mental culpability and the statutory aggravating factor of substantial planning and premeditation (RE 13:3106-3107).

The Indictment summarized the defendants' contacts with each other regarding the agreement and planning to kill Ms. Groves, Davis's efforts to locate Ms. Groves and notify Hardy of her whereabouts immediately prior to her death, and the execution of Ms. Groves. The court concluded, however, that these overt acts "can not be substituted for, nor do they translate to, the distinct finding that 'substantial' planning and 'substantial' premeditation preceded this death" (RE 13:3107).[6]

The district court also found that Counts One and Two of the Indictment failed to allege intent to kill for purposes of the FDPA, and there was no evidence that the grand jury considered the *mens rea* element in its findings (RE 13:3108). The government had argued, *inter alia*, that the description of Hardy's killing of Ms. Groves in the Overt Acts of Count One and the statement in Count Three that defendants did "willfully, deliberately * * * unlawfully kill Kim Marie Groves" satisfied the *mens rea* requirement (10 R. 3153-3155/D. Doc. 1072; see 10 R. 3148-3164).

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[6] In addition, reiterating a prior ruling, the district court rejected Davis's claim that the Indictment should be dismissed for failure to allege the *mens rea* in connection with "death resulting" (RE 13:3106 n.11). The court found that Counts One and Two sufficiently alleged willfulness to satisfy the noncapital charges (*ibid.*).

The district court held that, because the Fifth Circuit overturned the convictions on Count Three for lack of supporting evidence, the allegations set forth in Count Three could not be considered in evaluating whether the grand jury found that defendants willfully committed murder (RE 13:3109-3111). The district court also stated that the Fifth Circuit's dismissal of Count Three "undermine[d]" any finding by the grand jury on "substantial planning and premeditation" (RE 13:3110). The court reasoned that if there was no evidence to support the "long-range purpose" of preventing the victim from incriminating Davis, the jury could not have found "substantial planning" (*ibid.*). Finally, the court stated that it was "reluctant" to conclude there was sufficient notice of substantial planning and premeditation because only two jurisdictions that impose capital sentences, besides federal courts, consider this element as an aggravating factor to warrant the death penalty, and it is not a factor considered in Louisiana state court (RE 13:3111-3112).

The district court concluded that defendants raised a timely *Apprendi/Ring* challenge to the Indictment's alleged failure to include a *mens rea* element and statutory aggravating factors by raising it at sentencing (RE 13:3112-3117), quoting extensively from *United States* v. *Stewart*, 306 F.3d 295, 310 (6th Cir. 2002), cert. denied, 587 U.S. 1138 (2003) (RE 13:3115). The court deemed the challenge timely since it is only at sentencing that the defendants' intent and the statutory aggravating factor "would be used" to expand their potential exposure to a death sentence (RE 13:3116).

The district court concluded that the indictment only "validly charged * * * the 'mid-level' violations of Sections 241 and 242" (RE 13:3118). The court further concluded that, given convictions for these mid-level offenses, and the attachment of double jeopardy, the defendants could not be subjected to a capital sentence, but could be subject to "any term of years or for life" (RE 13:3118, 3121).

STANDARD OF REVIEW

Challenges to an indictment generally are reviewed *de novo*. *United States* v. *Shelton*, 937 F.2d 140, 142 (5th Cir.), cert. denied, 502 U.S. 990 (1991). The United States concedes that because Davis and Hardy raised this challenge prior to their second sentencing, their challenge is timely. See *United States* v. *Stewart*, 306 F.3d 295, 310 (6th Cir. 2002), cert. denied, 537 U.S. 1138 (2003). However, when an indictment is challenged for the first time on appeal, this Court reviews an indictment with "maximum liberality." *United States* v. *Henry*, 288 F.3d 657, 660 (5th Cir.), cert. denied, 537 U.S. 902 (2002). Given (1) the unusual procedural posture of this case, including an initial challenge to the indictment after conviction and appeal; (2) the absence of prejudice to the defendants given the unequivocal notice to them of the United States' intent to seek the death penalty; and (3) double jeopardy principles that make it impossible for the United States to supersede the Indictment in this case, this Court should review the Indictment with "maximum liberality." *Ibid*.

SUMMARY OF ARGUMENT

Pursuant to the logic of *Ring* v. *Arizona*, 536 U.S. 584 (2002), and the Supreme Court's holdings in *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000), and *United States* v. *Cotton*, 535 U.S. 625 (2002), a federal indictment must allege the mental state and a statutory aggravating factor to establish a defendant's eligibility for a death sentence under the Federal Death Penalty Act (FDPA), 18 U.S.C. 3591 *et seq*. An indictment must give sufficient notice of the charges and death eligibility, see *Hamling* v. *United States*, 418 U.S. 87, 117 (1974), but there is no "ritual of words." *United States* v. *Wilson*, 884 F.2d 174, 179 (5th Cir. 1989) (quoting *United States* v. *Purvis*, 580 F.2d 853, 857 (5th Cir. 1978), cert. denied, 440 U.S. 914 (1979)). An indictment need not quote or cite the statute underlying the offense or sentence in order to give a defendant sufficient notice. See *United States* v. *Jackson*, 327 F.3d 273, 303-304 (4th Cir. 2003) (opinion of court) (indictment issued pre-*Ring* sufficiently alleged an aggravating factor for death eligibility despite its failure to cite or quote the FDPA), *id*. at 287 (Niemeyer, J., concurring) (same, relying on *Ring*), petition for cert. pending, No. 03-5929; Fed. R. Crim. P. 7(c)(3).

The unusual procedural posture of this case warrants this Court's review of the Indictment with "maximum liberality." *United States* v. *Henry*, 288 F.3d 657, 660 (5th Cir.), cert. denied, 537 U.S. 902 (2002). Davis and Hardy filed a timely challenge to the sufficiency of the Indictment by raising their claim at the time of resentencing. See *Apprendi*, 530 U.S. at 490. Although timely, this initial

challenge is raised when double jeopardy principles make it impossible for the government to supersede the Indictment in this case to correct any error or omission. The defendants had ample notice of the United States' intent to seek the death penalty and the alleged mental culpability and statutory aggravating factors, and, therefore, they have not been prejudiced. The United States, however, is hindered because it cannot take corrective action. Accordingly, this Court should review the Indictment with "maximum liberality." See *Henry*, 288 F.3d at 660.

The charges of Counts One and Two, and the Overt Acts in Count One, describe in detail Davis and Hardy's agreement and plan to execute Ms. Groves, their repeated efforts to locate Ms. Groves, and her execution. Despite the absence of express citation to or quotation from the FDPA, the description of Davis and Hardy's actions gave them more than sufficient notice that the United States alleged (and the grand jury found), that the murder of Ms. Groves was committed with the requisite intent and substantial planning and premeditation. Cf. *Jackson*, 327 F.3d at 287 (Niemeyer, J., concurring); *id*. at 303-304 (opinion of court). The same facts that establish that Davis and Hardy acted intentionally in conspiring and killing Ms. Groves also show that their actions constitute substantial planning and premeditation and, thus, exceed the minimal effort to commit murder. Cf. *ibid*.; *United States* v. *Tipton*, 90 F.3d 861, 896 (4th Cir. 1996), cert. denied, 520 U.S. 1253 (1997). Particularly when read with maximum liberality, the Indictment sufficiently alleges intent and substantial planning and premeditation. See *Henry*, 288 F.3d at 660. To conclude the Indictment alleges intent and substantial planning

and premeditation is a "fair construction" of the Indictment based on "words of similar import." *United States* v. *Vogt*, 910 F.2d 1184, 1201 (4th Cir. 1990), cert. denied, 498 U.S. 1083 (1991) (quoting *Finn* v. *United States*, 256 F.2d 304, 306 (4th Cir. 1958)).

This Court does not have jurisdiction to hear Davis's cross-appeal since Davis has not yet been sentenced, and he is not subject to a final judgment. See 28 U.S.C. 1291. The challenged order also does not fall within the limited class of issues that may be raised pursuant to the collateral order doctrine. See *Flanagan* v. *United States*, 465 U.S. 259 (1984). Accordingly, there is no basis to establish this Court's jurisdiction for Davis's cross-appeal, and it should be dismissed.

ARGUMENT

I

INDICTMENT REQUIREMENTS PURSUANT TO *RING* AND *APPRENDI*

In *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000), the Supreme Court held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." In *Ring* v. *Arizona*, 536 U.S. 584 (2002), the Supreme Court applied *Apprendi* to Arizona's capital sentencing scheme, in which the trial judge alone conducted the post-conviction penalty hearing and determined the existence of statutory aggravating factors to support a death sentence. Reiterating its holding in *Apprendi*, the Supreme Court held, "[i]f a State makes an increase in * * * punishment contingent on the finding of a fact,

that fact -- no matter how the State labels it -- must be found by a jury beyond a reasonable doubt." *Ring*, 536 U.S. at 602. Thus, viewing the inquiry as "one not of form, but of effect," *ibid*. (quoting *Apprendi*, 530 U.S. at 494), the Supreme Court held that Arizona's aggravating factors "operate as 'the functional equivalent of an element of a greater offense'" and, therefore, they must be found by a jury under the reasonable doubt standard of the Sixth Amendment. *Id*. at 609 (quoting *Apprendi*, 530 U.S. at 494).

The Federal Death Penalty Act's capital sentencing scheme operates like the Arizona scheme in *Ring* in that a federal capital defendant is eligible for the death penalty only upon findings at a penalty hearing of both a mental culpability factor and a statutory aggravating factor, and a determination that the aggravating factors outweigh any mitigating factors. 18 U.S.C. 3591-3593. Because the federal statutory scheme already required that juries find those factors under the reasonable doubt standard, however, federal capital practice is not affected by *Ring*'s specific holding that "the Sixth Amendment required jury findings" as to the aggravating factors alleged to justify a sentence of death. 536 U.S. at 597 n.4.

The "tightly delineated" issue in *Ring* concerned only whether "the Sixth Amendment required jury findings" on the aggravating factors relied upon to establish eligibility for a death sentence. The Supreme Court specifically noted that *Ring* did not involve a claim of a defective indictment. *Id*. at 597-598 n.4. The Supreme Court in *United States* v. *Cotton*, 535 U.S. 625 (2002), however, made clear that "any fact that increases the penalty for a crime beyond the prescribed

statutory maximum must[,] * * * [i]n federal prosecutions, * * * be charged in the indictment," *id*. at 627 (citation omitted). Thus, in light of *Cotton*, the logic of *Ring* necessarily implies that federal grand juries must now, as a matter of constitutional law, allege the requisite aggravating factors that increase the maximum available penalty from life imprisonment to death in federal capital prosecutions. See generally *Harris* v. *United States*, 536 U.S. 545, 564-567 (2002) (plurality opinion); *Jones* v. *United States*, 526 U.S. 227, 243 n.6 (1999).[7] The requisite elements for death eligibility are mental culpability and a statutory aggravating factor. 18 U.S.C. 3591.[8]

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[7] See also *Sattazahn* v. *Pennsylvania*, 537 U.S. 101, 111-112 (2003) (Scalia, J., concurring) (principles of *Ring* and *Apprendi* mean that "murder plus one more [statutory] aggravating circumstances [to establish death eligibility] is a separate offense from 'murder' *simpliciter;*" acquittal of elements for death eligibility triggers Fifth Amendment double jeopardy principles).

[8] *Ring* explicitly overruled *Walton* v. *Arizona*, 497 U.S. 639 (1990), which held that a court may determine the statutory aggravating factors for the imposition of death. In *Cabana* v. *Bullock*, 474 U.S. 376, 384-386 (1986), the Supreme Court held that, for purposes of the Eighth Amendment, a judge or jury could find the requisite intent to commit murder for imposition of a death sentence. See *Hopkins* v. *Reeves*, 524 U.S. 88, 99-100 (1998) (reiterating the holding in *Cabana*). The Supreme Court's decision in *Cabana* follows on its decision in *Enmund* v. *Florida*, 458 U.S. 782, 797 (1982), which held that the Eighth Amendment prohibits imposition of the death penalty on an individual who only aids and abets a felony in the course of murder, but does not kill, attempt to kill, or intend that a killing take place.

Some of the Supreme Court's analysis in *Cabana*, 474 U.S. at 384-385, which is based on Fifth Amendment principles, is brought into serious doubt in light of *Apprendi*, *Cotton*, and *Ring*. Because *Ring* and *Walton* did not raise the issue of who must assess the requisite intent, the Supreme Court did not need to address the conflict or tension between *Cabana*, *Apprendi*, *Cotton*, and its decision

(continued...)

In addition, virtually every court to consider the question has held, or stated in *dicta*, based on the principles set forth in *Ring*, *Apprendi*, and *Jones*, that a statutory aggravating factor that establishes a defendant's eligibility for a death sentence must be alleged in an indictment. See, *e.g., United States* v. *Jackson*, 327 F.3d 273, 287 (4th Cir. 2003) (Niemeyer, J., concurring), petition for cert. pending, No. 03-5929; *United States* v. *Quinones*, 313 F.3d 49, 53 n.1 (2d Cir. 2002) (same), petition for cert. pending, No. 03-6148; *United States* v. *Safarini*, 257 F. Supp. 2d 191, 199 (D.D.C. 2003); *United States* v. *Regan*, 221 F. Supp. 2d 672, 680 (E.D. Va. 2002); but see *United States* v. *Battle*, 264 F. Supp. 2d 1088, 1102-1103 (N.D. Ga. 2003) (*Ring* does not require that a statutory aggravating factor be set forth in the indictment), appeal pending, No. 03-14908. Other courts that were presented

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[8](...continued)
in *Ring*. Cf. 21 U.S.C. 848(k), (n) (*mens rea* is a statutory aggravating factor ((n)(1)), and a jury finding is essential for further consideration of imposition of a death sentence).

Although the United States brings *Cabana* to this Court's attention, the United States further asserts that *Cabana* does not "directly control" the issue before this Court and, therefore, it is not bound to follow *Cabana*'s holding. Cf. *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) (courts of appeal should follow the Supreme Court precedent that "has direct application" to the issue at hand, even if the underlying reasoning is rejected in another line of cases). The issue and holding in *Cabana* concerned the court and jury's role under the Eighth Amendment while here the challenge is based on the Fifth Amendment. Moreover, *Cabana* did not address the requirements for an indictment when the federal government seeks the death penalty. As discussed herein, to hold that both mental culpability *and* a statutory aggravating factor must be alleged in the indictment and found by the jury is consistent with the logic of *Ring*, the Supreme Court's rulings in *Cotton* and *Apprendi*, this Court's precedent, and other court's interpretations of *Ring*.

with broader challenges have held that both the *mens rea* and a statutory aggravating factor to establish eligibility for the death penalty must be alleged in the indictment. See *United States* v. *Haynes*, 269 F. Supp. 2d 970, 979 (W.D. Tenn. 2003) (cases cited); *United States* v. *Sampson*, 245 F. Supp. 2d 327, 332 (D. Mass. 2003); *United States* v. *Lentz*, 225 F. Supp. 2d 672, 680 (E.D. Va. 2002).[9] While the former cases only presented the issue of the need to allege a statutory aggravating factor, the analysis implicitly encompasses the requirement that mental culpability also must be alleged in the indictment. See, *e.g.*, *Jackson*, 327 F.3d at 287 (Niemeyer, J., concurring); *Regan*, 221 F. Supp. 2d at 680.

This Court observed in *United States* v. *Bernard*, 299 F.3d 467, 488 (2002), cert. denied, 123 S. Ct. 2572 (2003), that "*Ring* did not *hold* that indictments in capital cases must allege aggravating and mental state factors" (emphasis added). That statement is literally true since *Ring* did not address requirements for a federal indictment. However, as shown by this Court's more recent interpretations of *Apprendi* and *Ring,* the principles and "import" of *Apprendi* and *Ring* require that a federal indictment allege mental culpability and a statutory aggravating factor to

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[9] While the *mens rea* or intent requirement and at least one statutory aggravating factor must be included in the indictment to establish and give notice of death eligibility, nonstatutory aggravating factors need not be set forth in the indictment. The latter category is considered in the assessment of whether to impose a death sentence, and does not increase the sentence beyond the statutory maximum and, therefore, need not be alleged in an indictment. See *Jackson*, 327 F.3d at 304-305 (opinion of court); *Haynes*, 269 F. Supp. 2d at 980; *United States* v. *Johnson*, 239 F. Supp. 2d 924, 943 (N.D. Iowa 2003); *Regan*, 221 F. Supp. 2d at 680-681.

give notice, and qualify a defendant as death eligible. *United States* v. *Matthews*, 312 F.3d 652, 663 (5th Cir. 2002), cert. denied, 123 S. Ct. 1604 (2003); see *United States* v. *Williams*, 343 F.3d 423, 433 (5th Cir. 2003). In *Matthews*, 312 F.3d at 663, this Court stated:

> [t]he import of *Apprendi* is inescapable: If a fact increases the statutory maximum penalty, it must be pleaded in the indictment and found by a jury beyond a reasonable doubt, regardless of whether Congress intended the fact to be a "sentencing factor" or an "element" of a separate offense.

Accordingly, this Court held that the elements of 18 U.S.C. 521, the "criminal street gangs statute," which imposes an enhanced sentence for certain crimes, must be alleged in the indictment and found by a jury by proof beyond a reasonable doubt. *Matthews*, 312 F.3d at 655, 661; see *id*. at 662 & n.11. Similarly, in *Williams*, 343 F.3d at 433, this Court held that 18 U.S.C. 242 identifies three distinct offenses and that, in light of *Apprendi* and *Ring*, the elements that subject a defendant to the maximum sentence of ten years' imprisonment – bodily injury or use of a dangerous weapon – must be alleged in the indictment and found by a jury beyond a reasonable doubt. Thus, consistent with *Cotton*, *Apprendi*, the logic of *Ring*, and this Court's precedent, this Court should affirm the district court's conclusion that a federal indictment must allege the mental culpability and a statutory aggravating factor under the FDPA to seek a death sentence. See *Williams*, 343 F.3d at 433; *Matthews*, 312 F.3d at 663.

II

SUFFICIENCY OF AN INDICTMENT

The requirement that an indictment allege the facts that make a defendant eligible for a death sentence under the Federal Death Penalty Act (FDPA) does not alter the standard for the sufficiency of an indictment. See *Hamling* v. *United States*, 418 U.S. 87, 117 (1974). To be sufficient, the indictment first must "contain[] the elements of the offense charged and *fairly inform*[] a defendant of the charge against which he must defend, and, second, enable[] him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *Ibid.* (emphasis added).

This Court's analysis of whether an indictment is constitutionally sufficient to give notice is governed by "practical, not technical considerations." *United States* v. *Fitzgerald*, 89 F.3d 218, 221 (5th Cir.), cert. denied, 519 U.S. 987 (1996). "The law [on indictments] does not compel a ritual of words." *United States* v. *Wilson*, 884 F.2d 174, 179 (5th Cir. 1989) (citation omitted). "It is settled law * * * that an indictment need not precisely track the language of the statute." *United States* v. *Hernandez*, 891 F.2d 521, 524 (5th Cir. 1989) (indictment citing 18 U.S.C. 924(c) but not including certain statutory text is still sufficient; no prejudice to defendant), cert. denied, 495 U.S. 909 (1990).

Rule 7(c)(3) of the Federal Rules of Criminal Procedure states, "[u]nless the defendant was misled and thereby prejudiced, neither an error in a citation *nor a citation's omission* is a ground to dismiss the indictment or information or to

reverse a conviction" (emphasis added). Consistent with this Rule, this Court has upheld indictments that have been silent, or identified an incorrect statutory basis for the charge or sentence, because the indictments still alleged the essential elements and gave reasonable notice to the defendant of the charged offense. See *United States* v. *Threadgill*, 172 F.3d 357, 373 (5th Cir.) (indictment was valid despite failure to identify the specific Texas statute violated to establish federal gambling charge; no prejudice since the defendants "must have known" their charge given that only one statute could meet description; citing earlier version of Rule 7(c)(3)), cert. denied, 528 U.S. 871 (1999); *United States* v. *Greenwood*, 974 F.2d 1449, 1472 (5th Cir. 1992) (indictment's incorrect classification of methamphetamine did not restrict court's authority to impose a more harsh sentence pursuant to the correct drug schedule), cert. denied, 508 U.S. 915 (1993); *United States* v. *Kennington*, 650 F.2d 544, 546 (5th Cir. 1981) (incorrect citation in indictment's caption (18 U.S.C. 371) does not void conviction when text identifies elements and correct citation for conviction (18 U.S.C. 841)); *United States* v. *Bethany*, 489 F.2d 91, 93 (5th Cir. 1974) (per curiam) (indictment's incorrect citation to 18 U.S.C. 2 is not a basis to reverse conviction when allegations in the indictment establish a crime). In *Kennington*, 650 F.2d at 546, this Court further held that a charged conspiracy to violate 18 U.S.C. 841 gave defendants sufficient notice of sentencing pursuant to 18 U.S.C. 846, even without citation to the latter provision.

As noted, the failure to allege a statutory element of an offense is not necessarily fatal to an indictment. See, *e.g.*, *Hernandez*, 891 F.2d at 524 (indictment not constitutionally flawed because of failure to allege gun was carried "in relation to" drug trafficking crime, as set forth in statute); see also *United States* v. *Ramirez*, 233 F.3d 318, 323 (5th Cir. 2000) (an indictment may have been "better" if it stated the category of offense ("all other cases") under 18 U.S.C. 111, but it was not constitutionally required because general statutory cite and description of illegal conduct "adequately informed" defendant of charged offense).

In fact, this Court has concluded that an indictment, as a whole, may incorporate or "fairly import[]" an element of an offense that is not specifically identified. *United States* v. *Henry*, 288 F.3d 657, 662 (5th Cir.) (knowledge requirement for charge under 18 U.S.C. 922 and 924 is "fairly imported" or "inferred" even though "the allegations *may not necessarily encompass a finding of knowledge*" given a reading of the indictment's facts and statutory citation with maximum liberality) (emphasis added), cert. denied, 537 U.S. 902 (2002); see *Wilson*, 884 F.2d at 179-181 (requisite intent is inferred in the indictment, despite omission, given allegations that the defendant used or carried a firearm during and in relation to a drug trafficking crime); *United States* v. *Bieganowski*, 313 F.3d 264, 285 (5th Cir. 2002) (indictment alleging mail fraud was valid despite the absence of an allegation that the false statements were "material" when allegations "warrant an inference" of materiality), cert. denied, 123 S. Ct. 1956 (2003). Thus, "the test of

the validity of an indictment is not whether the indictment could have been framed in a more satisfactory manner, but whether it conforms to minimal constitutional standards." *Ramirez*, 233 F.3d at 323; *Wilson*, 884 F.2d at 179 (same quote) (citing *United States* v. *Webb*, 747 F.2d 278, 284 (5th Cir. 1984), cert. denied, 469 U.S. 1226 (1985)).

The Fourth Circuit rejected a claim nearly identical to Davis and Hardy's; that is, an assertion that a death sentence based on an indictment issued before *Ring* was invalid because the indictment did not allege "any" of the FDPA's statutory aggravating factors. *United States* v. *Jackson*, 327 F.3d 273, 303-304 (2003) (opinion of the court),petition for cert. pending, No. 03-5929; see *id*. at 281-287 (Niemeyer, J., concurring).[10] Despite the absence of any citation to or quotation from the FDPA, the Fourth Circuit held that the indictment's charge that Jackson violated 18 U.S.C. 924(j)(1) by committing murder during the commission of kidnaping gave Jackson sufficient notice of his eligibility for death based on the FDPA's statutory aggravating factor of death occurring during the commission of, among other crimes, kidnaping. *Id*. at 303 n.1, 304; see 18 U.S.C. 3592(c)(1).

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[10] In his reply brief, Jackson alleged for the first time that an indictment must identify *all* statutory aggravating factors for death eligibility to be valid. See *Jackson*, 327 F.3d at 304 (opinion of court). Both the majority, *id*. at 304-305, and Judge Niemeyer, in his concurrence, *id*. at 288-289, rejected this assertion on review for plain error. The issues before this Court are not raised in Jackson's Petition for Certiorari. Jackson's Petition challenges the court of appeals' application of plain error review to his belated claim that all statutory aggravating factors must be alleged in the indictment. Jackson also asserts claims of double jeopardy based on his state court conviction and ineffective assistance of counsel. See *Jackson* v. *United States*, No. 03-5929.

Although the majority's analysis does not rely on *Ring* or *Apprendi*, Judge Niemeyer's concurrence thoroughly analyzed the principles set forth in those and related cases to conclude that an indictment must identify the statutory aggravating factor(s) that render a defendant eligible for the death penalty. *Jackson*, 327 F.3d at 281-287. Judge Niemeyer next concluded that the Indictment, despite the absence of citation to the FDPA, sufficiently identified aggravating factors to render Jackson eligible for death. *Id.* at 287-299. First, the Indictment alleged that death occurred during the commission of kidnaping, which satisfied FDPA Section 3592(c)(1). *Id.* at 288 (Niemeyer, J., concurring). Moreover, the indictment's allegation of aggravated sexual abuse under 18 U.S.C. 2241 gave Jackson sufficient notice of his eligibility for death based on a second FDPA statutory aggravating factor, Section 3592(c)(6), which applies to an offense that involves "serious physical abuse to the victim." *Ibid.*; see *United States* v. *Battle*, 264 F. Supp. 2d 1088, 1102-1103 (N.D. Ga. 2003) (if *Ring* required that the indictment charge intent and a statutory aggravating factor, indictment satisfied FDPA even without "duplicat[ion]" of FDPA's text; murder "with malice aforethought" gave notice of death eligibility under (FDPA) Section 3591(a)(2)(A); allegations of murder while defendant was serving a term of life imprisonment similarly satisfied (FDPA) Section 3592(b)(3)), appeal pending, No. 03-14908.

III

BECAUSE DAVIS AND HARDY CHALLENGED THE INDICTMENT AFTER TRIAL AND APPEAL, THE INDICTMENT IS REVIEWED WITH MAXIMUM LIBERALITY

The United States recognizes that Davis and Hardy raised a timely challenge to the sufficiency of an indictment for purposes of sentencing. See *United States* v. *Stewart*, 306 F.3d 295, 310 (6th Cir. 2002), cert. denied, 537 U.S. 1138 (2003). Given the unusual procedural posture of this case at the time of Davis and Hardy's initial challenge, however, double jeopardy principles make it impossible for the government to supersede the indictment to correct any error or omission. See *Jeffers* v. *United States*, 432 U.S. 137, 150 (1977). Davis and Hardy have not alleged, nor can they reasonably assert, that they were prejudiced since they received ample and undeniable notice of the United States' intent to seek the death penalty. The United States, however, is hindered because it cannot take corrective action in this instance. In these circumstances, this Court reads an indictment with "maximum liberality." *United States* v. *Henry*, 288 F.3d 657, 660 (5th Cir.), cert. denied, 537 U.S. 902 (2002).

This Court has held repeatedly that when a challenge to an indictment is raised for the first time on appeal, and in the absence of prejudice, an indictment is "read with maximum liberality[,] finding it sufficient unless it is so defective that by any reasonable construction, it fails to charge the offense for which the defendant is convicted." *Ibid*. (quoting *United States* v. *Fitzgerald*, 89 F.3d 218, 221 (5th Cir. 1996) (despite failure to allege specifically, indictment is construed to

allege defendant's knowledge given allegations that the defendant possessed a firearm while under a restraining order, and citation to 18 U.S.C. 922(g)(8) and 924(a)(2), cert. denied 519 U.S. 987 (1996)); *United States* v. *Richards*, 204 F.3d 177, 191-193 (5th Cir.) (indictment alleging mail and wire fraud is valid, when read with maximum liberality, given description of statements, overt acts, and context, despite the absence of an allegation that the false statements were "material"), cert. denied, 531 U.S. 826 (2000); *United States* v. *Wilson*, 884 F.2d 174, 179 (5th Cir. 1989) (court "read[s] the indictment liberally" because the challenge is first raised on appeal without showing prejudice; defendant's scienter is "fairly import[ed]" even in absence of allegation of "knowing").

The Supreme Court and other circuits have extended the rule of reading an indictment with maximum liberality to cases in which an indictment is challenged before appeal, but after jeopardy has attached. See, *e.g.*, *Hagner* v. *United States*, 285 U.S. 427, 433 (1932) (for challenge raised post-verdict and without evidence of prejudice, "it is enough that the necessary facts appear in any form, or by a fair construction can be found within [its] terms"); *United States* v. *Avery*, 295 F.3d 1158, 1174 (10th Cir.) ("Where a defendant first challenges 'the absence of an element of the offense' after a jury verdict, 'the indictment [will be deemed] sufficient if it contains words of similar import to the element in question.' * * * '[W]e will find the indictment sufficient unless it is so defective that by any *reasonable construction*, it fails to charge the offense for which the defendant is convicted.'") (citation omitted), cert. denied, 537 U.S. 1024 (2002); *United States*

v. *Olson*, 262 F.3d 795, 799 (8th Cir. 2001) ("when the sufficiency of an indictment is challenged *after jeopardy attaches*," the court should "liberally construe the indictment, finding it sufficient 'unless it is so defective that by no reasonable construction can it be said to charge the offense for which the defendants were convicted'") (emphasis added and citation omitted); *United States* v. *Sabbeth*, 262 F.3d 207, 218 (2d Cir. 2001) ("Where, as here, a defendant challenges the sufficiency at the close of the Government's case, we hold that the indictment should still be construed in a liberal manner."); *United States* v. *Vogt*, 910 F.2d 1184, 1201 (4th Cir. 1990) ("[w]hen a post-verdict challenge to the sufficiency of an indictment is made, 'every intendment is then indulged in support of . . . sufficiency'") (quoting *Finn* v. *United States*, 256 F.2d 304, 307 (4th Cir. 1958)), cert. denied, 498 U.S. 1083 (1991).

On July 31, 1995, prior to trial, the United States gave Davis and Hardy notice of its intent to seek the death penalty upon conviction of any count, and identified the applicable mental culpability provisions and statutory aggravating factors to establish their death eligibility (2 R. 309-310/D. Doc. 179 (Notice to Hardy); 2 R. 311-312/D. Doc. 178 (Notice to Davis)). After conviction, the jury found the requisite intent and the statutory aggravating factor of substantial planning and premeditation for both defendants (RE 10), and sentenced Davis and Hardy to death (RE 11; RE 12). After this Court vacated their original sentences, the United States again gave notice to Davis and Hardy of its intent to seek the death penalty, identifying the relevant mental culpability provisions and the

statutory aggravating factor of substantial planning and premeditation (7 R. 2247-2248/D. Doc. 744) (Davis); 1 3d Supp. R. 1756-1756a/H. Doc. 743 (Hardy)). Thus, there clearly is no basis for Davis or Hardy to assert they did not have sufficient notice of the United States' intent to seek the death penalty. As the question before the Court is one of the technical sufficiency of the Indictment in light of *Ring*, and given the unusual procedural posture of this case, the Court should review the Indictment with maximum liberality. Cf. *Henry*, 288 F.3d at 660; *Wilson*, 884 F.2d at 179-181.

IV

THE THIRD SUPERSEDING INDICTMENT SUFFICIENTLY ALLEGES THAT DAVIS AND HARDY HAD THE REQUISITE INTENT UNDER THE FDPA TO MURDER KIM MARIE GROVES

The district court erred in its conclusion that this Indictment failed to give adequate notice to Davis and Hardy of their respective mental culpability and substantial planning and premeditation, which, according to the lower court, bars the jury's consideration of a death sentence under the FDPA.

The charges and Overt Acts set forth in the Indictment, individually and in combination, allege in detail deliberate acts by Davis and Hardy to conspire, plan, and commit the murder of Ms. Kim Marie Groves. By describing their actions, the Indictment gave sufficient notice of the mental culpability requirement to support death eligibility under the FDPA. See Fed. R. Crim. P. 7(c)(3); cf. *United States* v. *Jackson*, 327 F.3d 273, 287-289 (4th Cir. 2003) (Niemeyer, J., concurring), petition for cert. pending, No. 03-5929; *id*. at 303-304 (opinion of court). The Indictment

was sufficient to support the mental culpability under paragraphs 18 U.S.C. 3591(a)(2)(A)-(C). First, the fifth Overt Act described in Count One of the Indictment states that Hardy "shot Kim Marie Groves in the head with a 9 mm firearm, which resulted in her death" (RE 8:291). That statement, whether viewed in isolation or in conjunction with other facts outlining the preparation for Ms. Groves' murder, establishes that Hardy "intentionally killed the victim" within the meaning of 18 U.S.C. 3591(a)(2)(A). The absence of the term "intentional" is not fatal since, *in toto*, the allegations establish the deliberate nature of the killing. Cf. *United States* v. *Henry*, 288 F.3d 657, 662 (5th Cir.) (knowledge element imported even though not alleged), cert. denied, 537 U.S. 902 (2002).

In addition, the fifth Overt Act and Count Two's allegation that Davis and Hardy, while "aiding and abetting each other, did *willfully deprive* Kim Marie Groves * * * of [constitutional] rights * * * by shooting Kim Marie Groves in the head with a firearm, resulting in her death" (RE 8:291-292), gave notice to Davis and Hardy of intent as defined in Section 3591(a)(2)(B), which calls for proof that the defendant "intentionally inflicted serious bodily injury that resulted in the death of the victim."

The Overt Acts describe how Davis called Hardy "to arrange the murder of Kim Marie Groves;" Davis arranged for a meeting with Hardy and Causey to identify Ms. Groves; Davis conducted surveillance in order to locate Ms. Groves; and Davis contacted Hardy in order to report her location and order her killed, which Hardy, in turn, agreed to, and carried out (RE 8:290-291). These details, in

conjunction with the charges in Counts One (engaging in a "willful[]" conspiracy to use excessive force with death resulting) and Count Two (willfully depriving Ms. Groves of her civil rights by use of excessive force through shooting), simultaneously reflect the grand jury's conclusion, and notice to Davis and Hardy that they each "intentionally participated in an act, contemplating that the life of a person would be taken * * * and the victim died as a direct result of the act," which satisfies the mental culpability element pursuant to Section 3591(a)(2)(C).

Moreover, the petit jury's unanimous conclusions at the initial penalty phase that Hardy intentionally killed Ms. Groves, which satisfies Section 3591(a)(2)(A), and that Davis engaged in intentional acts contemplating that Ms. Groves' life would be taken, which satisfies Section 3591(a)(2)(C) (6 R. 1941, 1943), further support the conclusion that the grand jury would have made similar findings when it issued the indictment. See *United States* v. *Mechanik*, 475 U.S. 66, 67 (1986) ("petit jury's verdict of guilty beyond a reasonable doubt demonstrates *a fortiori* that there was probable cause to charge the defendants with the offenses for which they were convicted"); cf. *United States* v. *Cotton*, 535 U.S. 625, 633 (2002) (plain error in failing to allege drug quantity in indictment did not substantially affect verdict given overwhelming evidence, and conclusion that grand jury "would have also found" drug quantity if presented); *United States* v. *Matthews*, 312 F.3d 652, 665 (5th Cir. 2002) (indictment's failure to allege essential element is harmless since "any rational grand jury, when presented with a proper indictment," would have found all elements for the offense), cert. denied, 123 S. Ct. 1604 (2003);

United States v. *Patterson*, 241 F.3d 912, 914 (7th Cir.) (if the petit jury found the existence of a fact beyond a reasonable doubt, the court may conclude the grand jury would have made the same finding given its lower standard of proof), cert. denied, 534 U.S. 853 (2001).

Quotation of the language of FDPA Section 3591(a)(2) would not produce any greater notice to defendants than is conveyed by the description of the defendants' deliberate actions. No additional facts or allegations need be alleged to reflect Davis and Hardy's intent.

The Indictment's description of Davis and Hardy's intentional acts gave fair notice, through functionally equivalent terms and descriptions, of the mental culpability element for death eligibility. When further considered with "maximum liberality," a reasonable and fair construction of the allegations establishes, at a minimum, that Hardy intentionally killed Ms. Groves, and that Davis intentionally acted contemplating that her life would be taken. Cf. *Henry*, 288 F.3d at 660; *United States* v. *Vogt*, 910 F.2d 1184, 1201 (4th Cir. 1990), cert. denied, 498 U.S. 1083 (1991). Accordingly, the Indictment sufficiently gave Davis and Hardy notice of their requisite intent to be death eligible.

V

THE INDICTMENT SUFFICIENTLY ALLEGES THAT DAVIS AND HARDY ENGAGED IN SUBSTANTIAL PLANNING AND PREMEDITATION LEADING TO THE MURDER OF KIM MARIE GROVES

The district court erred in concluding that the overt acts "can not be substituted for, nor do they translate to, the distinct finding that 'substantial'

planning and 'substantial' premeditation preceded this death" (RE 13:3107). The Overt Acts, which outlined the numerous communications between Davis, Hardy, and Causey, and their individual efforts prior to, and in coordination of, Ms. Groves' murder, amply establish that the defendants acted with substantial planning and premeditation, and gave sufficient notice to Davis and Hardy of this factor to render them death eligible. Cf. *United States* v. *Jackson*, 327 F.3d 273, 288 (4th Cir. 2003) (Niemeyer, J., concurring), petition for cert. pending, No. 03-5929; *id*. at 303-304 (opinion of court); *United States* v. *Tipton*, 90 F.3d 861, 896 (4th Cir. 1996), cert. denied, 520 U.S. 1253 (1997).

First, the district court's conclusion is inconsistent with this Court and other courts' interpretations of the term "substantial." Cf. *United States* v. *Flores*, 63 F.3d 1342, 1373-1374 (5th Cir. 1995), cert. denied, 519 U.S. 825 (1996). "Substantial," as used in "substantial planning and premeditation," carries a common sense meaning that does not require further explanation for a jury to understand. *Ibid*. This Court has held that "substantial planning and premeditation" in 21 U.S.C. 848(n)(8) and the FDPA is not unconstitutionally vague, that the term "substantial" alone is sufficient for instructing a jury, and that it often "denote[s] a thing of high magnitude." *Flores*, 63 F.3d at 1373-1374; see *United States* v. *Webster*, 162 F.3d 325, 354 n.70 (5th Cir. 1998) (*Flores's* conclusion of constitutionality of "substantial planning and premeditation" in 21 U.S.C. 848 applies to FDPA Section 3592(c)(9)), cert. denied, 528 U.S. 829 (1999). The courts state that "substantial planning and premeditation"

encompasses more than the minimal amount necessary to commit an offense, but it does not require an extraordinary effort. See, *e.g.*, *Tipton*, 90 F.3d at 896 ("substantial * * * planning and premeditation" factor requires only "a higher degree of planning * * * than the minimum amount sufficient to commit the offense;" "more than merely adequate" gives a "commonly understood meaning" of the statutory factor); *United States* v. *McCullah*, 76 F.3d 1087, 1110-1111 (10th Cir. 1996) (aggravator requires only that planning be "considerable" or "ample for the commission of the crime" but need not be "considerably more" than "typical for a murder"), cert. denied, 520 U.S. 1213 (1997).

Here, many of the same Overt Acts that establish Davis and Hardy's intent similarly establish their substantial planning and premeditation. Davis called Hardy "to arrange the murder of Kim Marie Groves" because she had filed an internal complaint against Davis, and Davis wanted to eliminate any further communication by Ms. Groves with law enforcement officers (RE 8:290). Davis contacted Causey to arrange for a meeting with Hardy and Causey so he could identify Ms. Groves to them; Davis conducted surveillance while on duty and in his police car in order to locate Ms. Groves; Davis contacted Hardy in order to report Ms. Groves' location, describe her appearance, and repeat his order to have her killed; and Hardy, in turn, agreed to and did kill Ms. Groves soon thereafter (RE 8:290-291; see pp. 10-13, *infra*). This degree of coordination clearly reflects more than the minimal effort necessary to commit murder. Cf. *Tipton*, 90 F.3d at 896.

In addition, the allegations regarding Davis and Hardy's communication and planning (which conform to the evidence at trial), far exceed the efforts of other defendants who courts have found engaged in substantial planning and premeditation. Cf. *Ibid*. (defendants' motive and travel to the victim's apartment with a gun to commit the murder reflected a premeditated purpose and "substantial planning or premeditation," even though actual killing was not done by firearm); *Jackson*, 327 F.3d at 301 (Niemeyer, J., concurring) (murder after victim was kidnapped and raped, yet without evidence of planning prior to kidnaping, satisfies "substantial planning and premeditation"). Moreover, particularly when considered with maximum liberality, Davis and Hardy's acts in preparation and coordination of Ms. Groves' murder constitute "substantial planning and premeditation." Cf. *United States* v. *Henry*, 288 F.3d 657, 660 (5th Cir.), cert. denied, 537 U.S. 902 (2002); *United States* v. *Vogt*, 910 F.2d 1184, 1201 (4th Cir. 1990), cert. denied, 498 U.S. 1083 (1991).

To the extent the district court's ruling reflects a determination on the sufficiency of the evidence (as opposed to an assessment of comparative or substitute text for "substantial planning and premeditation"), that analysis is foreclosed by the district court's acceptance of the original petit jury's findings of this very aggravating factor during the penalty phase. Cf. *United States* v. *Becerra*, 155 F.3d 740, 752 (5th Cir. 1998) ("law of the case" generally precludes court from revisiting issue previously decided); see also *United States* v. *Mechanik*, 475 U.S. 66, 67 (1986).

The district court found that only a few hours passed between Davis's decision to murder Ms. Groves and her execution and concluded that was too short a time period to support a finding of "substantial planning." That finding is both factually and legally flawed. First, the evidence at trial established that almost 24 hours passed between when Davis learned that Ms. Groves had filed the complaint against him with the police department's Internal Affairs office and her murder. See Statement of Facts, pp. 12-13, *infra*. More importantly, the passage of time between planning and execution is not determinative of whether a defendant's planning is substantial. It is axiomatic that the extent to which coincidence, luck, or happenstance may advance a defendant's criminal plan is irrelevant to an assessment of the planning or coordination necessary to commit an offense.

Moreover, the district court's conclusion that this Court's earlier dismissal of Count Three, which "alleged a plan with a long-range purpose," "undermines" any finding that the grand jury found "substantial planning and premeditation" is flawed (RE 13:3110). Whether or not Davis and Hardy had a long range plan regarding the future impact or consequence of Ms. Groves' murder is irrelevant to this analysis. Substantial planning considers the steps taken to prepare and commit an offense. While a motive may be long standing, or may be based on the future, long term consequences of an unlawful act, it need not be for a defendant's actions to constitute substantial planning and premeditation. Whether or not the consequences of illegal conduct have long term impact has no bearing on whether defendants' coordination and planning *before* the crime is beyond a minimal effort.

Finally, the district court's "reluctan[ce]" to recognize a finding of substantial planning, and therefore establish death eligibility, because only a limited number of jurisdictions consider this element a statutory aggravating factor is without legal basis (RE 13:3111). Since the element is included in the FDPA, the only question before the court is whether it was adequately alleged.

Thus, as with mental culpability, the absence of verbatim text from the FDPA does not render this Indictment invalid. Cf. *Jackson*, 327 F.3d at 288 (Niemeyer, J., concurring); *id*. at 303-304 (opinion of court); *Henry*, 288 F.3d at 662. By describing Davis and Hardy's actions, the Indictment reflects the grand jury's determination, and gives notice to the defendants, that proof of the allegations establishes substantial planning and premeditation.

VI

DAVIS'S CROSS-APPEAL SHOULD BE DISMISSED FOR LACK OF JURISDICTION

The Court instructed the parties to address whether it has jurisdiction to hear Davis's cross-appeal. Since Davis has not yet been sentenced, there is no final order from which an appeal may be taken under 28 U.S.C. 1291. See *Midland Asphalt Corp.* v. *United States*, 489 U.S. 794, 798 (1989); *Flanagan* v. *United States*, 465 U.S. 259 (1984). Moreover, Davis cannot establish jurisdiction pursuant to the "collateral order doctrine," a "narrow exception" to the final judgment rule, since his challenge to the court's ruling on allowable sentencing

options is reviewable upon entry of a final judgment. See *Midland Asphalt*, 489 U.S. at 798. Accordingly, his cross-appeal should be dismissed.

Section 1291 of Title 28 confers jurisdiction upon this Court for appeals "from all final decisions of the district courts." In criminal cases, a final decision occurs after conviction and sentencing. *Midland Asphalt*, 489 U.S. at 798. The final order rule is imposed to promote efficiency and avoid piecemeal litigation. See *Flanagan*, 465 U.S. at 264; *United States* v. *Hollywood Motor Car Co.*, 458 U.S. 263, 265 (1982) (per curiam).

The Court created the "collateral order doctrine" as a limited exception to the requirement of a final order. See *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545-547 (1949). To qualify for collateral order review, the challenged order "must (1) 'conclusively determine the disputed question,' (2) 'resolve an important issue completely separate from the merits of the action,' and (3) 'be effectively unreviewable on appeal from a final judgment.'" *Midland Asphalt*, 489 U.S. at 799 (quoting *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978)). This criteria is applied stringently, and "with the utmost strictness" in criminal cases. *Flanagan*, 465 U.S. at 265.

Collateral appeals in criminal cases are limited to those pretrial orders that affect "an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial." *United States* v. *MacDonald*, 435 U.S. 850, 860 (1978). Thus, as the Supreme Court summarized in *Flanagan*, 465 U.S. at 265-266, there are only three pre-trial orders that may be reviewed on interlocutory

appeal: denial of a motion to reduce bail, denial of a motion to dismiss on double jeopardy grounds, and denial of a motion to dismiss based upon a violation of the Speech and Debate Clause of the Constitution. See *Abney* v. *United States*, 431 U.S. 651, 659 (1977) (denial of dismissal based on double jeopardy falls within collateral order review); see also *United States* v. *Brown*, 218 F.3d 415, 419-422 (5th Cir. 2000) (collateral order doctrine establishes jurisdiction for appeal of district court's restrictions imposed by a gag order on the parties' comments during the pendency of proceedings), cert. denied, 531 U.S. 1111 (2001). In each of these instances, the right would be "irretrievably lost" if the defendant had to wait until trial was completed to raise it. *Flanagan*, 465 U.S. at 266; see *United States* v. *Perez*, 70 F.3d 345, 346-347 (5th Cir. 1995) (jurisdiction for double jeopardy claim), vacated on other grounds, 519 U.S. 990 (1996).

In contrast, an appeal of a denial of dismissal of an indictment on other grounds, such as a speedy trial or prosecutorial misconduct claim, does not qualify under the collateral order doctrine. See *Midland Asphalt*, 489 U.S. at 798-802 (alleged violation of Fed. R. Crim. P. 6(e) does not establish collateral order jurisdiction); *MacDonald*, 435 U.S. at 853-862 (speedy trial claim does not qualify for collateral review); *United States* v. *Jackson*, 30 F.3d 572, 574 (5th Cir. 1994) (dismissal without prejudice is not a "final judgment" under Section 1291 and does not qualify for collateral review). Consistent with precedent, in *United States* v. *Comeaux*, 954 F.2d 255 (5th Cir. 1992), this Court rejected defendant's argument that his claim of prosecutorial misconduct and unfair delay "raises the equivalent of

a double jeopardy concern," and held that it did not have jurisdiction to hear the appeal. *Id.* at 259-261.

Davis's assertion that the Indictment failed to give adequate notice of death eligibility is not akin to a Double Jeopardy claim; he is not suffering an irretrievable harm that cannot be corrected after sentencing is completed. Cf. *Comeaux*, 954 F.2d at 259-260. Accordingly, just as in *Comeaux*, *id.* at 260, this Court should conclude it does not have jurisdiction to hear Davis's cross-appeal. See *Flanagan*, 465 U.S. at 267.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's order barring the jury's consideration of a death sentence for Davis and Hardy.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 24, 2003, two copies of the foregoing Brief For The United States As Appellant - Cross-Appellee and a diskette containing the brief were served by Federal Express, overnight mail, on the following counsel of record:

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

I certify that the foregoing Brief For the United States As Appellant - Cross-Appellee complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). This brief contains 11,967 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

October 24, 2003

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